DR SYED AZMAN SYED AHMAD NAWAWI & ORS v. DATO' SERI HJ AHMAD SAID

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-602-04-2014]
3 JULY 2015

CIVIL PROCEDURE: *Appeal – Appellate interference – Trial court misdirecting itself and applying wrong principles of law – Whether appellate interference justified*

CIVIL PROCEDURE: *Pleadings – Pleading material facts – Whether sufficient particulars of malice pleaded to displace the defence of qualified privilege in defamation suit*

TORT: *Defamation – Defences – Qualified privilege – Whether malice proven to displace defence – Whether sufficient particulars of malice pleaded – Whether compliance with O. 78 r. 3(3) of the Rules of Court 2012 mandatory – Whether actual or express malice established*

This appeal by the defendants was against the decision of the High Court in holding that the appellants ('the defendants') had libelled the second respondent ('the plaintiff') and ordering damages in the sum of RM200,000 in favour of the second plaintiff. The action was related to an article bearing the heading 'Seleweng RM30j bantuan sekolah?' published in the 'Harakah'. The first defendant was the author of the article and a Member of the Terengganu State Legislative Assembly for the Batu Burok Constituency. The second and third defendants were holders of the Publication Permit and the Chief Editor of Harakah respectively. The fourth defendant was the printer of Harakah. The second plaintiff was at the material time the Menteri Besar of the State of Terengganu. The judge had concluded that the defamatory passages referred to the second plaintiff. The High Court Judge ('the judge') then went on to consider the defence of qualified privilege raised by the defendants and held that the defence had been established by the first defendant, in that, the statement bearing the defamatory tendency was made on a privileged occasion. Nevertheless, the judge held that the first defendant failed to act reasonably or responsibly and therefore, had acted intentionally and with malice. The issue arising for determination in this appeal was whether O. 78 r. 3(3) of the Rules of Court 2012 ('the ROC') had been satisfied or that sufficient particulars of the facts in support of the allegation of malice by the plaintiffs had been pleaded in the statement of claim or the statement of reply, for the judge to deliberate upon, much less, conclude that the publication by the defendants was motivated by 'malice'. In this context, the following two questions had to be determined by the court: (i) whether compliance with O. 78 r. 3(3) of the ROC is a mandatory requirement; and

A (ii) whether the malice as alluded to in various paragraphs of the statement of claim and the reply filed by the plaintiffs, was sufficient, for the court to conclude that actual 'malice' had been pleaded and therefore proved.

Held (allowing the appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

B

(1) Aside from the accepted two stage assessment by the court in a defamation suit, there would follow a further stage of enquiry where the court upon the second stage evaluation determines that the defendant is entitled on the facts to have the claim dismissed on the grounds that the defence of either qualified privilege or fair comment (on a matter of public interest) has been established. This third stage enquiry is to ascertain whether actual or express 'malice' has been established by the plaintiff by way of rebuttal, to extinguish either of those defences. (para 24)

C

D **(2)** The first defendant (as an ADUN) had a duty to make the statement as he did in the Harakah article and 'orang ramai' (the public) had a corresponding interest or duty to receive it. (para 28)

(3) Order 78 r. 3(3) of the ROC is a specific adjectival provision that has to be strictly complied with or adhered to, if one intends to disqualify

E the defence of qualified privilege or fair comment on the grounds of express malice. Particulars of the fact and matters from which malice is to be inferred by the court have to be specifically pleaded. No inference or conclusion on 'malice' can ensue at all unless there is such a pleading. (para 32)

F **(4)** The tenor of the language used in O. 78 r. 3(3) of the ROC does not rule out or exclude the possibility of the plaintiff pleading 'the particulars of the facts and matters from which malice is to be inferred' in the statement of claim itself. If so done, it then follows that a reply specifically setting out the same particulars of the facts and matters from

G which express malice is to be inferred, would be redundant. (para 39)

(5) There is a wide divide between merely or casually stating in the pleadings that the statements were made 'maliciously' and meeting the requirement to provide the particulars of facts and matters from which express or actual malice is to be inferred to defeat the defence of

H qualified privilege. (para 44)

(6) The matters pleaded by the plaintiffs in the reply and in the statement of claim were bare and bland statements with respect to malice on the part of the defendants with no particulars of the facts or detail of matters from which express malice could be inferred or attributed to the

I defendants. The plaintiffs had not condescended to providing any particulars as required by O. 78 r. 3(3) of the ROC at all. As such there was nothing on the records for the judge to even launch into the further

third enquiry as to whether the statements made on an occasion of qualified privilege had been motivated by actual or express malice, much less, to conclude that the plaintiffs had proven there was malice behind those statements made by the defendants. The conclusion of the judge on this issue of 'malice' was therefore bereft of any valid basis. It was also evident from the grounds of the judge that there was no analysis or any deliberation at all as to any relevant fact or matters from which the court was to make or draw the inference of 'malice' as required, as against the defendants. This was where the judge had fallen into error. (para 45)

(7) The appellate court was entitled to interfere with the decision of the trial court since the trial court had misdirected itself and applied wrong principles of law in coming to its conclusion. (para 47)

(8) It is also trite that the parties are bound to their filed pleadings and in this case the plaintiffs' pleadings, may it be the reply or the statement of claim, both were sorely lacking of particulars of facts and matters from which an inference of express malice was to be deduced by the court. (paras 47 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan-defendan terhadap keputusan Mahkamah Tinggi dalam memutuskan bahawa perayu-perayu ('defendan-defendan') telah memfitnah responden ('plaintif kedua') dan dalam memerintahkan ganti rugi sebanyak RM200,000 berpihak kepada plaintif kedua. Tindakan ini berkaitan dengan satu artikel bertajuk 'Seleweng RM30j bantuan sekolah?' yang diterbitkan dalam akhbar 'Harakah'. Defendan pertama adalah penulis artikel tersebut dan ahli Dewan Undangan Negeri Terengganu bagi kawasan Batu Burok. Defendan kedua dan ketiga masing-masing adalah pemegang permit penerbitan dan Ketua Pengarang Harakah. Defendan keempat adalah pencetak Harakah. Plaintif kedua pada masa material merupakan Menteri Besar Negeri Terengganu. Hakim telah membuat kesimpulan bahawa perenggan-perenggan fitnah tersebut merujuk kepada plaintif kedua. Hakim kemudiannya mempertimbangkan pembelaan perlindungan bersyarat yang dibangkitkan oleh defendan-defendan dan memutuskan bahawa pembelaan telah dibuktikan oleh defendan pertama, di mana, kenyataan mengandungi unsur fitnah telah dibuat dalam keadaan istimewa. Walau bagaimanapun, hakim memutuskan bahawa defendan pertama gagal untuk bertindak secara munasabah atau bertanggungjawab dan oleh itu, telah bertindak dengan sengaja dan berniat jahat. Isu yang timbul untuk diputuskan dalam rayuan ini adalah sama ada A. 78 k. 3(3) Kaedah-Kaedah Mahkamah 2012 ('KKM') telah dipenuhi atau bahawa butiran fakta-fakta yang mencukupi bagi menyokong tuduhan berniat jahat oleh plaintif-plaintif telah diplidkan dalam pernyataan tuntutan atau pernyataan balas, untuk hakim mempertimbangkan, apatah lagi, menyimpulkan bahawa penerbitan oleh defendan-defendan telah didorong oleh 'niat jahat'. Dalam konteks ini,

kedua-dua soalan berikut perlu diputuskan oleh mahkamah: (i) sama ada pematuhan kepada A. 78 k. 3(3) KKM adalah satu keperluan mandatori; dan (ii) sama ada 'niat jahat' seperti yang disebut dalam pelbagai perenggan pernyataan tuntutan dan pernyataan balas yang telah difailkan oleh plaintif-plaintif adalah mencukupi untuk mahkamah membuat kesimpulan bahawa 'niat jahat' sebenar telah diplidkan dan oleh itu telah dibuktikan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Selain daripada dua peringkat taksiran yang diterima pakai oleh mahkamah dalam saman fitnah, ia akan diikuti dengan peringkat siasatan selanjutya di mana mahkamah pada penilaian peringkat kedua memutuskan bahawa defendan layak berdasarkan fakta-fakta mengarahkan tuntutan ditolak atas alasan bahawa pembelaan sama ada perlindungan bersyarat atau komen berpatutan (pada perkara yang melibatkan kepentingan awam) telah dibuktikan. Peringkat ketiga siasatan ini adalah untuk memastikan sama ada 'niat jahat' sebenar atau nyata telah dibuktikan oleh plaintif melalui bantahan, untuk meluputkan salah satu daripada pembelaan-pembelaan tersebut.

(2) Defendan pertama (sebagai ADUN) mempunyai satu tanggungjawab untuk membuat kenyataan sepertimana dilakukannya dalam artikel Harakah dan orang ramai mempunyai kepentingan sama atau tanggungjawab untuk menerimanya.

(3) Aturan 78 k. 3(3) KKM adalah satu peruntukan adjektif khusus yang perlu dipatuhi secara ketat atau diikuti jika seseorang ingin menyingkirkan pembelaan perlindungan bersyarat atau komen berpatutan atas alasan niat jahat nyata. Butiran fakta-fakta dan perkara di mana niat jahat hendaklah disimpulkan oleh mahkamah harus secara khususnya diplidkan. Tiada anggapan atau kesimpulan mengenai 'niat jahat' boleh terjadi langsung kecuali terdapat pliding sebegitu.

(4) Erti kata bahasa yang digunakan dalam A. 78 k. 3(3) KKM tidak menolak atau mengenepikan kebarangkalian plaintif memplidkan 'the particulars of the facts and matters from which malice is to be inferred' dalam penyataan tuntutan berikut. Jika begitu, maka diikuti dengan satu penyataan balas secara khusus yang menyatakan butiran fakta-fakta dan perkara sama di mana niat jahat nyata adalah hendaklah disimpulkan, akan menjadi berlebihan.

(5) Terdapat jurang yang besar antara hanya atau secara bersahaja menyatakan dalam pliding-pliding bahawa kenyataan tersebut dibuat 'dengan niat jahat' dan memenuhi keperluan untuk menyediakan butiran fakta-fakta dan perkara di mana niat jahat sebenar atau nyata hendaklah disimpulkan untuk menafikan pembelaan perlindungan bersyarat.

(6) Perkara-perkara yang diplidkan oleh plaintif-plaintif dalam penyataan balas dan tuntutan adalah kenyataan-kenyataan yang kosong dan hambar terhadap niat jahat oleh defendan-defendan tanpa butiran fakta-fakta atau perkara secara terperinci di mana niat jahat nyata boleh disimpulkan atau dianggap berpunca daripada defendan-defendan. Plaintif-plaintif dalam penyediaan tidak membentangkan apa-apa butiran seperti dikehendaki oleh A. 78 k. 3(3) KKM sama sekali. Oleh itu, tidak ada apa-apa dalam rekod-rekod bagi hakim untuk melancarkan siasatan ketiga selanjutnya sama ada kenyataan-kenyataan yang dibuat ketika dalam keadaan di bawah perlindungan bersyarat bermotivasikan niat jahat sebenar atau nyata, apatah lagi, untuk menyimpulkan bahawa plaintif-plaintif telah membuktikan bahawa terdapat niat jahat di belakang kenyataan-kenyataan yang dibuat oleh defendan-defendan. Kesimpulan oleh hakim dalam isu 'niat jahat' ini, oleh itu, ketandusan asas sah. Ia juga terbukti daripada alasan-alasan hakim bahawa tidak terdapat analisis atau apa-apa perbincangan langsung tentang apa-apa fakta atau perkara di mana mahkamah harus membuat atau mengeluarkan anggapan mengenai 'niat jahat' seperti dikehendaki, terhadap defendan-defendan. Ini adalah di mana hakim telah terkhilaf.

(7) Mahkamah Rayuan berhak untuk campur tangan dengan keputusan mahkamah bicara kerana mahkamah bicara telah dengan sendiri tersalah arah dan menggunakan prinsip-prinsip undang-undang yang salah dalam membuat kesimpulannya.

(8) Ia adalah biasa bahawa pihak-pihak juga terikat dengan pliding-pliding yang difailkan mereka dan dalam kes ini pliding-pliding plaintif-plaintif, sama ada penyataan tuntutan atau balas, kedua-duanya kekurangan butiran fakta-fakta dan perkara di mana satu anggapan niat jahat nyata telah diputuskan oleh mahkamah.

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***
Bonnick v. Morris [2003] 1 AC 300 ***(refd)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 ***(refd)***
Grant v. Torstar Corp [2009] 3 SCR 640 ***(refd)***
Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors [2001] 7 CLJ 268 HC ***(refd)***
Horrocks v. Lowe [1975] AC 135 ***(refd)***
Jameel Mohamed v. Wall Street Journal Europe SPRL [2006] UKHL 44 ***(refd)***
Loutchansky v. Times Newspapers Ltd [2001] EWCA Civ 1805 ***(refd)***
Luk Kai Lam v. Sim Ai Leng [1978] 1 LNS 110 FC ***(refd)***
M Prabhakaran v. Salam Seran [2001] 3 CLJ 615 HC ***(refd)***
Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 ***(foll)***
Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor [2011] 10 CLJ 739 HC ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 12(1)
Rules of Court 2012, O. 78 r. 3(3)
Rules of the High Court 1980, O. 6 r. 7(2A)
Rules of the Supreme Court 1957, O. 19 r. 22
Surbodinate Courts Rules 1980, O. 43 r. 3(3)
Defamation Act 2013 [UK], s. 4

Source(s) referred to:
Gatley on Libel and Slander, 11th edn, p 1037

For the appellant - Mohamed Hanipa Maidin (Azhana Mohd Khairudin with him); M/s Mohamed Hanipa & Assocs
For the respondent - Zamani Ibrahim (Helmi Hamzah with him); M/s Hisham Sobri & Kadir

[Editor's note: For the High Court judgment, please see Kerajaan Negeri Terengganu & Yang Lain lwn. Dr Syed Azman Syed Ahmad Nawawi & Yang Lain [2014] 1 LNS 357.]

Reported by Amutha Suppayah

JUDGMENT

Varghese George JCA:

Introduction

[1] This appeal by the defendants was against the decision of the High Court (28 February 2014) in a defamation action. The court had held that the defendants had only libelled the second plaintiff (amongst three plaintiffs) and had ordered general and exemplary damages in the sum of RM200,000 in favour of the second plaintiff.

(In this judgment the parties will, for convenience, be referred to as they were at the High Court).

[2] The action by the plaintiffs was related to an article bearing the heading "Seleweng RM30j bantuan sekolah?" published on '11 to 13 November 2011' - Issue of the 'Harakah'. The first defendant was the writer of the article and a member of the Terengganu State Legislative Assembly for the Batu Burok Constituency. The second and third defendants were the holder of the publication permit and the Chief Editor of Harakah respectively. The fourth defendant was the printer of Harakah.

[3] The second plaintiff was at the material time the Menteri Besar of the State of Terengganu.

[4] In para. 24 of the statement of claim, the plaintiffs specifically identified the alleged defamatory content in the article and the same is reproduced here in full:

> 24. Pada muka surat N5 di dalam akhbar Harakah bertarikh 11 - 13 November 2011 di bawah tajuk "Seleweng RM30j bantuan sekolah?". Defendan Ke-2 hingga Defendan Ke-4 dengan salah dan/atau berniat

jahat dan/atau berunsur fitnah mencetak dan menerbitkan atau menyebabkan dicetak dan diterbitkan kenyataan yang dibuat oleh Defendan Pertama yang mengaitkan Plaintif-Plaintif dengan kenyataan sepertimana di bawah ("Artikel Fitnah"):

(a) "... Program bantuan ini berterusan selama tiga tahun dan jumlah keseluruhan adalah RM28.47 juta yang dibelanjakan untuk 232,966 pelajar di seluruh Terengganu sepanjang tahun 2008 - 2010" (perenggan 3);

(b) "Harga di pasaran ialah RM26.70 dan RM76.50 berbanding harga pembekal antara RM73.50 dan RM123.30 dan ini bermakna kerajaan dapat berjimat sebanyak RM1.42 juta pada kadar harga jauh lebih rendah" (perenggan 7);

(c) "Persoalan besar adalah bagaimanakah projek yang diurus setia oleh Pejabat Menteri Besar sendiri boleh berlaku salah-urus dan kebocoran amat ketara ..." (perenggan 8);

(d) "Siapakah yang perlu bertanggungjawab dalam pelanggaran peraturan perolehan kerajaan ini? Menteri Besar sendirikah atau pegawai kerajaan yang terbabit? Dan siapakah yang mendapat keuntungan besar dengan memeras jerih susah rakyat miskin di seluruh negeri Terengganu ini?" (perenggan 9);

(e) "Bayangkanlah bantuan pakaian dan alatan sekolah yang dikhususkan untuk golongan miskin telah berlaku salah-laku dan penyelewengan di manakah sifat amanah dalam menjalankan tugas kalau untuk golongan miskin juga telah berlaku salah urus dan kebocoran yang amat memalukan seluruh rakyat Terengganu" (perenggan 10);

(f) "Amat malang golongan miskin di Terengganu kita ini. Sudahlah mereka sentiasa diperas-ugut dengan cengkaman pelbagai bantuan dan subsidi serta wang ihsan bagi terus dipaksa menyokong Umno-BN, peruntukan untuk mereka juga telah diselewengkan tanpa rasa sebarang belas kasihan" (perenggan 11); dan

(g) "Ya mungkin ini tepat dengan tema pentadbiran Menteri Besar Ahmad Said; 'merakyatkan pentadbiran dan pembangunan' dengan memeras keringat dan air mata rakyat miskin Ganu kita" (perenggan 12).

[5] The "Laporan Ketua Audit Negara - Aktiviti Jabatan/Agensi dan Pengurusan Syarikat Kerajaan Negeri Terengganu, Tahun 2010", more particularly material under the caption "Program Bantuan Pakaian dan Alatan Sekolah", formed the backdrop, as it so appeared in the defence and at trial, for the matters commended upon and/or questioned in the impugned article in Harakah. This source material was not in dispute. The said laporan by the Federal Auditor General had been laid before both, the Federal Parliament and at the Terengganu State Legislative Assembly.

[6] The learned High Court Judge in the alasan penghakiman in this case had adopted the paragraph-numbering, namely, paras. (a) to (g) in para. 24 of statement of claim reproduced above, to premise the sequence of Her

Ladyship's deliberations and consequent findings with respect to the alleged defamatory material in this case. Ideally, the said impugned paragraphs in the statement of claim should have been considered in the context of the whole published article but this was not the approach adopted by the trial judge.

Judgment Of The High Court

[7] The learned judge correctly affirmed that there was a two stage process involved when a defamation suit was being adjudicated upon by the court. The initial burden was on the plaintiffs to show:

(a) the words were defamatory;

(b) the words complained did refer to the plaintiff(s); and

(c) the words had been published.

[8] The learned judge noted that the publication of the article was not being disputed here by the defendants.

[9] As regards the issue whether the words or statements complained of were capable of bearing a defamatory meaning, it was the learned judge's conclusion that only paras. (c), (d), (e), (f) and (g) were capable of a defamatory meaning or effect. This finding was expressed in the following terms:

> Bagi pengataan dalam Perenggan 24(c), (d), (e), (f) dan (g) dalam Penyata Tuntutan, pada pendapat saya dalam maksud asal dan semulajadi bermaksud pada orang biasa yang munasabah Plaintif adalah seorang penyeleweng, penipu, tidak amanah, tidak boleh dipercayai, tidak bertanggungjawab dan tidak layak mentadbir Terengganu.
>
> Pengataan-pengataan ini mendedahkan Plaintif-Plaintif kepada kebencian, cemuhan atau penghinaan pada seseorang biasa yang munasabah atau menjatuhkan kedudukan Plaintif dalam pemikiran masyarakat umumnya.
>
> Pengataan ini juga serangan kepada moral dan karakter Plaintif yang beliau tidak jujur, tidak amanah, pemimpin tidak boleh dipercayai dan tidak bertanggungjawab.
>
> Dengan itu saya dapati, pengataan-pengataan dalam Perenggan 24(c), (d), (e), (f) and (g) adalah berunsur fitnah.
>
> Manakala pengataan-pengataan dalam Perenggan 24(a) dan (b) saya dapati tidak berunsur fitnah kerana pengataan-pengataan ini datangnya dari laporan rasmi iaitu Laporan Ketua Audit Negara.

[10] On the question of whether the words or statements complained of referred to the plaintiffs, the learned judge had this to say:

> Adakah seseorang yang munasabah, bila membaca pengataan ini akan mengetahui bahawa pengataan yang diadukan merujuk kepada Plaintif-Plaintif?
>
> Pengataan tidak secara jelas menyebut nama Plaintif Kedua, Plaintif Ketiga dan Plaintif Keempat.

Pengataan-pengataan fitnah di Perenggan 24(c), (d), (e), (f) dan (g) merupakan pengataan mengenai dengan pentadbiran Negeri Terengganu yang diketuai oleh Plaintif Kedua. Pengataan melibatkan rakyat Negeri Terengganu yang mana peruntukan untuk golongan miskin telah diselewengkan oleh pihak pentadbir Negeri Terengganu.

Dalam Perenggan 24(c), (d) dan (g) secara jelas menyebut Menteri Besar Terengganu iaitu Plaintif Kedua dan Perenggan 24(e) dan (f) membawa maksud merujuk kepada Plaintif.

Dari keseluruhan pengataan dalam Perenggan 24(c), (d), (e), (f) dan (g), saya dapati pengataan fitnah tersebut merujuk pada Plaintif Kedua dan tidak pada Plaintif Ketiga dan Plaintif Keempat.

The conclusion reached was that the alleged defamatory passages referred only to the second plaintiff.

[11] Moving on then to the second stage of the enquiry, the learned judge noted that:

Pembelaan Defendan-Defendan secara alternative adalah:

(i) Pembelaan perlindungan bersyarat

(ii) Komen berpatutan.

(namely, that the defences were qualified privilege, or alternatively, fair comment).

[12] On whether the defence of qualified privilege had been established on evidence, the learned judge held:

"Pembelaan mengenai perlindungan bersyarat hanya dapat disangkal dengan pembuktian yang Defendan bertindak membuat pengataan-pengataan berbentuk fitnah dengan niat jahat."

"Di dalam tindakan ini Defendan Pertama telah keluarkan pengataan fitnah terhadap Plaintif Kedua melalui akhbar Harakah. Defendan Pertama sebagai Ahli Dewan Undangan Negeri Batu Burok Terengganu berada dalam privileged occasion untuk membuat penyataan untuk disampaikan kepada rakyat,"

...

"Orang ramai mempunyai hak untuk menerima apa yang diberitahu oleh Defendan Pertama sebagai Ahli Dewan Undangan Negeri yang menjaga kepentingan rakyat bagi perkara-perkara yang benar dan tidak untuk menerima apa-apa yang disampaikan dengan sengaja disalahtafsirkan."

...

"Dari pengataan-pengataan di atas membuktikan yang Defendan Pertama gagal untuk bertindak secara munasabah dan bertanggungjawab dan membuktikan yang Defendan Pertama bertindak secara sengaja dan berserta niat jahat."

The finding of the court was therefore that the defence of qualified privilege had been established by the first defendant, in that, the statement (bearing the defamatory tendency) was made on a privileged occasion. Nevertheless, according to the learned judge, the first defendant failed to act reasonably or responsibly and therefore, had acted intentionally and with malice.

[13] In respect of the defence of 'fair comment' the learned judge's comments were:

> "Pembelaan komen berpatutan mestilah berdasarkan atas fakta yang terbukti adalah benar".
>
> "Defendan Pertama, sebagai Ahli Dewan Undang Negeri mempunyai tanggungjawab untuk memberitahu rakyat untuk perkara-perkara yang melibatkan kepentingan awam tetapi pengataan-pengataan yang hendak disampaikan perlulah fakta-fakta yang benar untuk diterima oleh rakyat."
>
> "Di dalam tindakan ini, pengataan-pengataan yang dibuat dan disiarkan terhadap Plaintif Kedua telah memfitnah Plaintif Kedua."
>
> "Defendan-Defendan telah membuat pengataan yang tidak benar mengenai Plaintif Kedua dan tidak boleh untuk dijustifikasikan sebagai kepentingan awam. Defendan Kedua telah memfitnah Plaintif Kedua."

A translation of the above extract bear out that the learned judge was of the view that for the defence of fair comment (on a matter of public importance) to succeed, it had to be based on 'facts'. In this case the learned judge added that the defendants had made 'untruthful statements' and therefore could not justify the statements as fair comment.

[14] The learned judge then went on to make the following observations on the issue of 'malice', which Her Ladyship had earlier correctly identified, would nonetheless negate the defence of qualified privilege (para. 12 above) even if it had been proven by the defendants:

> Mempercayai secara jujur sahaja tidak mencukupi untuk menyangkal niat jahat dalam membuat pengataan-pengataaan fitnah, jika dapat dibuktikan bahawa:
>
> - the dominant motive of a defendant in making the statement was to vent personal spite or desire to injure; or
>
> - to obtain private advantage or some purposes rather than in the exercise of the relevant duty - rujuk kes *S Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ (Rep) 233.
>
> "Dengan keterangan-keterangan di atas saya dapati Defendan Pertama membuat pengataan fitnah terhadap Plaintif Kedua seperti yang diplidkan dalam Perenggan 24(c) hingga (g) di dalam Penyata Tuntutan telah dilakukan dengan niat jahat oleh Defendan Pertama, maka dengan itu pembelaaan perlindungan bersyarat tidak terpakai terhadap Defendan Pertama dalam keadaan ini."

[15] The conclusion of the trial court was summarised in the following terms:

> Berdasarkan pada semua alasan-alasan di atas, Mahkamah dapati Defendan-Defendan gagal membuktikan pembelaan mereka dan saya dapati Plaintif Kedua telah berjaya membuktikan pengataan-pengataan fitnah seperti di Perenggan 24(c) hingga (g) telah dilakukan terhadap Plaintif Kedua. Pengataan-pengataan fitnah tersebut telah menyebabkan Plaintif Kedua alami kerugian dan Plaintif Kedua berhak untuk diberi gantirugi oleh Defendan-Defendan.
>
> Saya dapati Plaintif Kedua dan Plaintif Ketiga gagal membuktikan kes mereka terhadap Defendan-Defendan.

The Appeal

[16] The defendants had appealed against the whole of the decision of the trial court. It must be registered here however that the second plaintiff (or for that matter any of the other plaintiffs), had not filed an appeal (or any cross appeal) against the findings of the learned judge (or any part of the same).

[17] The finding of the court that the defendants had established that publication by the first defendant was made on an 'occasion' of or was protected by 'qualified privilege' was undoubtedly a material finding or conclusion of the court. The express finding of the learned judge in this respect, to repeat, was that:

> "Pembelaan mengenai Perlindungan bersyarat ... Defendan Pertama sebagai Ahli Dewan Undangan Negeri Batu Burok Terengganu berada dalam privileged occasion untuk membuat penyataan untuk disampaikan kepada rakyat."
>
> ...
>
> "Orang ramai mempunyai hak untuk menerima apa yang diberitahu oleh Defendan Pertama sebagai Ahli Dewan Undangan Negeri ...".

[18] At the outset of the hearing before us, we pointed out to counsel for the second plaintiff (respondent before us) that there was no appeal by the plaintiffs on the specific finding of the court that the defendants were entitled to the defence of 'qualified privilege' and this would mean that the second plaintiff was not challenging that finding by the court. Counsel confirmed that they were not pursuing an appeal on that finding, on account of the stance that they would be taking, namely, that the court had rightly held that there was 'malice' when the defendants published the alleged article and accordingly such a defence had by reason of that been negated or rendered inapplicable.

[19] Upon this clarification, counsel for the defendants (the appellants) opted not to pursue with his appeal to overturn the finding of the court that paras. (c), (d), (e), (f) and (g) were defamatory or capable of a defamatory meaning. Counsel then limited the appeal to the issue whether the learned

A trial judge was entitled to decide or was correct in Her Ladyship's conclusion on the issue of 'malice' (against the defendants), as was held here in this case. The submission of the defendants was specifically premised on the failure of the plaintiffs to comply with the provision of O. 78 r. 3(3) of the ROC 2012, for any contention related to 'malice' to even take off or be considered in the B first place by the court.

[20] Accordingly, both counsel agreed that the sole issue remaining for determination in this appeal was therefore whether O. 78 r. 3(3) had been satisfied or that sufficient particulars of the facts in support of the allegation of malice by the plaintiffs had been pleaded in the statement of claim C and/or the statement of reply, for the learned judge to deliberate upon, much less, conclude that the publication by the defendants was motivated by 'malice'.

Counsel were allowed an adjournment to revise/supplement their submissions on this sole issue and address us further thereon.

D

Submissions - Summary

[21] The defendants submitted that to defeat qualified privilege pleaded by the defendants as a defence in the defamation action it was incumbent upon the plaintiffs to file a reply giving particulars of the facts and matters from E which express malice was to be inferred by the court. This it was asserted was a mandatory pre-requisite pursuant to O. 78 r. 3(3) and here in this case it had not been complied with by the plaintiffs. In the absence of such necessary particulars of facts and matters from which an inference of malice could be made, the learned judge, it was submitted, had no basis to even F address the question of 'malice' and was therefore clearly in error or had misdirected herself when she held that 'malice' had been 'proven' and the defendants' successful defence of qualified privilege had been consequently defeated.

[22] It was also contended that vague and general assertions as to 'niat G jahat' in the reply, or even in the statement of claim that were filed by the plaintiffs was in any event insufficient to provide a sustainable basis for the learned judge's conclusion that malice on the part of the defendants had been established on the evidence; what was required were particulars and facts with some specificity to be pleaded for the court to draw such inference that H the impugned statements were actuated by 'malice' on the part of the defendants.

[23] The plaintiffs, on the other hand, contended that both the statement of claim and the reply contained sufficient averments to show that the statements attributed to the defendants and the subject of these proceedings I were actuated by malice, and the learned judge was therefore correct in holding that 'malice' has been established to demolish the defence of qualified privilege ruled in the defendants' favour in this matter.

Our Deliberation And Decision

[24] Two preliminary observations have to be made at the outset. The first was that, aside from the accepted two stage assessment by the court in a defamation suit, it need be pointed out that there would follow a further stage of enquiry where the court upon the second stage evaluation had determined that the defendant was entitled on the facts to have the claim dismissed on the grounds that the defence of either qualified privilege or fair comment (on a matter of public interest) has been established. This so called third stage enquiry, required in law, was to ascertain whether actual or express 'malice' had been established by the plaintiff by way of rebuttal, to extinguish either of those defences.

[25] The second point in the particular context of this case was that, although the learned judge had found that the defendants could not avail themselves of the defence of 'fair comment' (since the claimed 'facts' upon which the first defendant's comments were premised, had not been supposedly established in the first place), this defence of fair comment was only an alternative defence of the defendants. The principle defence raised by the defendants to the plaintiffs' action was 'qualified privilege', which defence, the learned judge had found to have been established.

[26] In the circumstances the court's finding on the defence of 'fair comment' which was adverse to the defendants, was of no consequence. It did not detract in any way from the conclusion arrived at by the court on the primary defence of 'qualified privilege' found in favour of the defendants and which, it must be reiterated, was not being appealed against.

[27] With respect to 'qualified privilege', it is instructive to recall that in *Adam v. Ward* [1917] AC 309, Lord Atkinson noted as follows:

> ... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. It is essential for the defence of qualified to succeed; to at least satisfy two criterias, i.e. one there is a legal, moral or social duty to make the statement on one side. The other is that there is a corresponding interest to receive it. However if it is spiked with malice, this defence will not be available.

(See also: Lord Diplock in *Horrocks v. Lowe* [1975] AC 135; *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142).

[28] The learned judge had correctly identified and applied the principles of law involved in this area when, firstly, Her Ladyship found that the first defendant (as an ADUN) had a duty to make the statement as he did in the Harakah article and that 'orang ramai' (the public) had a corresponding interest or duty to receive it.

A As pointed out above, the court also appreciated the position in law that this defence of qualified privilege would in any event be negated if 'malice' on the part of the first defendant was shown.

[29] The only issue therefore before us now was whether there was relevant material in the pleadings before the court for Her Ladyship to, firstly, B consider and to move on then to conclude that the impugned statements were actuated by express 'malice', thereby putting to nought or neutralising completely that defence of qualified privilege.

[30] In that context and in the light of the submissions of counsel for the respective parties, the two questions that had to be determined by this court C were:

(a) whether compliance with O. 78 r. 3(3) was a mandatory requirement, in that "particulars of the facts and matters from which the malice was to be inferred" had to be pleaded; and

D (b) whether the 'niat jahat' as alluded to in various paragraphs of the statement of claim and/or the reply filed by the plaintiffs, was sufficient, for the court to conclude that actual 'malice' had been pleaded and therefore proved.

E **[31]** Order 78 r. 3(3) ROC 2012 was in the following terms:

3. Obligations to give particulars (O. 78 r. 3)

(1) .....

(2) .....

F (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a G privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

(4) ...

H **[32]** There can be no dispute that O. 78 r. 3(3) is a specific adjectival provision that had to be strictly complied with or adhered to, if one was intending to disqualify the defence of qualified privilege or fair comment on the grounds of express malice. The mandatory nature of this requirement had been affirmed by a long line of decisions of our courts.

I **[33]** *Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor* [2011] 10 CLJ 739 was one such decision on strict compliance required with respect to O. 78 r. 3(3), which also went on to set out succinctly the rationale for such strict compliance with this rule of procedure in the following terms:

> Order 78 r. 3 ... operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply by giving particulars of the facts and matters from which malice is to be inferred. Thus the plaintiff bears the burden of proof (of) malice. The effect of O. 78 r. 3(3) RHC is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified.

[34] We also found merit in counsel for defendants' submission that O. 78 r. 3(3) was expressed in mandatory terms as denoted by the words used therein, namely, where " ... the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which malice in to be inferred".

[35] As regards the use of the term 'must' in O. 78 r. 3(3) and the imperative implication behind the use of that term in statutory or procedural parlance, our attention was drawn to the observation of the Federal Court in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 (involving the interpretation of O. 6 r. 7(2A) of the then RHC). Zaki Tun Azmi CJ stated there:

> In my opinion the object of the new O. 6 r. 7 was to make it really tight as to when a writ can be renewed. The word 'must' appearing in O. 6 r. 7(2A) is not usually used in Malaysian Legislations. Normally the word used is 'shall'. So in this case, when the word must 'must' is used, the intention is to fully ensure that it is complied with and no discretion is to be given as far as the compliance with the prerequisites is concerned. "Must" is a very strong word; in my opinion it is stronger (than) the word "shall".

[36] Counsel for the second plaintiff however submitted that on the authority of the Supreme Court decision in *Luk Kai Lam v. Sim Ai Leng* [1978] 1 LNS 110; [1978] 1 MLJ 214, the failure to file a reply setting out the particulars of express malice was not fatal to the plaintiffs' case in any event. In our reading the relevance of that decision (under the then O. 19 r. 22 of Supreme Court Rules 1957 where the word in contention was 'shall' and not 'must' in our present case), if at all was that such "particulars of the facts and matters from which the malice is to be inferred" need not be confined to the reply filed but could even be set out in the statement of claim (discussed further below in this judgment).

[37] VT Singham J in the High Court case of *M Prabhakaran v. Salam Seran* [2001] 3 CLJ 615; [2001] 6 MLJ 368 had occasion to consider the decision in the *Luk Kai Lam* case and the then O. 43 r. 3(3) of the Subordinate Courts Rules 1980 (in *pari materia* with the then O. 78 r. 3(3) of the Rules of the High Court 1980 and the present Rules of Court 2012). This is what His Lordship held:

A This court is of the view that where the Plaintiff wishes to rely on express malice on the part of the Defendant in order to defeat the plea of qualified privilege, he will have to plead to this effect and give particulars of facts and matters from which he alleges the malice is to be inferred and this should be done by way of reply and not in the statement of claim (see *Gatley on Libel and Slander* (9th ED) and 28 *Halsbury's Law of England* B para 150 (4th Ed).

However, the plaintiff's counsel relied on *Luk Kai Lam v. Sim Ai Leng* [1978] 1 MLJ 214 to support his argument that the plaintiff was not required to serve a reply as malice had already been pleaded in the statement of claim. In that case, there was evidence from the plaintiff that C the words uttered by the defendant and found to be defamatory were made out of spite and the defendant did not testify in court about the matter.

Consequently, His Lordship Lee Hun Hoe CJ (Borneo), speaking for the Federal Court, found that the learned judge had held those words which D were spoken by the defendant were of malice and the defence of qualified privilege failed even though there was no reply with particulars of the malice filed by the plaintiff on the facts in that case.

Further, under O. 19 r. 22 of the Rules of the Supreme Court 1957 ('RSC'), which was referred to in *Luk*'s case, there was no mandatory requirement to deliver a reply giving particulars of the facts and matters E from malice is to be inferred. Therefore, His Lordship Lee Hun Hoe CJ (Borneo), having considered O. 19 r. 22 of the RSC, held that the plaintiff did not need to specifically allege malice in his reply if he had already alleged malice in the statement of claim and the proviso to O. 19 r. 22 of the SCR did not come into play. Nevertheless, for the purpose of clarity and to distinguish both the rules, it is useful to refer to the express F provision of O. 19 r. 22 of the RSC, which reads as follows:

> Provided that where in an action for libel or slander the defendant pleads that any of the words or matters complained of are fair comment on a matter of public interest or were published upon a privileged occasion, the plaintiff shall, if he intends to allege that G the defendant was actuated by express malice, deliver a reply giving particulars of the facts and matters from which such malice is to be inferred.

Whereas O. 44 r. 3(3) of the SCR expressly states that '... the defendant must serve a reply giving particulars of the facts and matters from which H the malice is to be inferred.' The crux of the issue is, whether it is mandatory for the plaintiff to serve a reply under O. 44 r. 3(3) of the SCR if the plaintiff intends to allege that the defendant was actuated by express malice when compared to the proviso in O. 19 r. 22 of the RSC or is the plaintiff allowed to rely on its statement of claim. This court is of the view that in order to determine this issue, both the word 'shall' in I O. 19 r. 22 of the RSC and the word 'must' in O. 44 r. 3(3) of the SCR must be considered.

> The use of the word 'shall' in O. 19 r. 22 of the RSC is merely directory and implies some discretion (see *Soong Ah Chow & Anor v. Lai Kok Cheng* [1986] 1 MLJ 42, whereas the use of word 'must' instead of 'shall' in O. 44 r. 3(3) of the SCR will itself be sufficient to hold the expression to be mandatory.
>
> In the circumstances, this court is of the view that in order for the plaintiff to rely on express malice, he 'must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.'

[38] Firstly therefore, it was an established principle of law that particulars of the fact and matters from which malice was to be inferred by the court had to be specifically pleaded "so that the truth and correctness of the particulars relied upon can be checked and verified" by the trial judge. No inference or conclusion on 'malice' could ensue at all unless there was such a pleading.

[39] Reverting back then to the meaning that ought to be reasonably ascribed to the words used in the earlier part of O. 78 r. 3(3), namely:

> where ... the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts or which he relies in support of the allegation of malice ...

It is our considered view that the tenor of the language used does not rule out or exclude the possibility of the plaintiff's pleading "the particulars of the facts and matters from which malice is to be inferred" in the statement of claim itself. If so done, it then followed that a reply specifically setting out the same particulars of the facts and matters from which express malice is to be inferred, would be deemed to be redundant and superfluous.

[40] This then brings us to the crux of the question for our determination, namely, whether the plaintiffs' pleading found either in statement of claim or the reply did sufficiently satisfy the requirements of O. 78 r. 3(3). The requirement to provide specifically the particulars of the facts and matters from which express malice was to be inferred, was not a mere formality but was founded, in our view, on sound policy and practical considerations. It was to provide the defendants with advance notice as to the issues of fact to be met by the defendants to ensure that their defences of qualified privilege or fair comment was not denied from them ultimately. The defendants had to know with definiteness and some degree of precision how to rebut such an allegation of 'facts and material' underlying the plaintiffs' allegation of express malice. From that perspective there was no denying that it had serious evidential implications for the defendants, as the truth and veracity of those facts and material was also to be determined by the court within the one and same trial itself.

[41] This therefore called for a critical and objective examination of what was actually pleaded in this case by the plaintiffs in the reply and/or their statement of claim. The relevant averments as regards the defendants' alleged

'malicious' intent were found set out in the following paragraph of the statement of claim:

> 21. Defendan Pertama telah mengarang artikel yang tidak benar dan/atau berniat jahat dan/atau berunsur fitnah yang mengaitkan Plaintif-plaintif dengan niat agar ianya disebarkan melalui akhbar Harakah yang dipegang permitnya oleh Defendan Ke-2 serta dicetak oleh Defendan Ke-4.
>
> 22. ...
>
> 23. Defendan Pertama telah dengan salah dan berniat jahat mengarang artikel yang tidak benar dan/atau berniat jahat dan/atau berunsur fitnah dengan tujuan agar ia diterbitkan dan/atau dipaparkan di dalam akhbar Harakah yang dipegang permitnya oleh Defendan Ke-2 serta dicetak oleh Defendan Ke-4 bagi merosakkan reputasi dan nama baik Plaintiff.
>
> 24. Pada muka surat N5 di dalam akhbar Harakah bertarikh 11 - 13 November 2011 di bawah tajuk "Selewang RM30j bantuan sekolah?" Defendan Ke-2 hingga Defendan Ke-4 dengan salah dan./atau berniat jahat dan/atau berunsur fitnah mencetak dan menerbitkan atau menyebabkan dicetak dan diterbitkan kenyataan yang dibuat oleh Defendan Pertama yang mengaitkan Plaintif-plaintif dengan kenyataan sepertimana di bawah ("Artikel Fitnah") ...
>
> 25. ...
>
> 26. ...
>
> 27. ...
>
> 28. ...
>
> 29. Penerbitan perkataan-perkataan dan/atau kenyataan-kenyataan yang tidak benar dan/atau berniat jahat dan/atau berunsur fitnah yang terkandung di dalam Artikel Fitnah tersebut kepada orang awam dan/atau di dalam pengetahuan orang awam dan/atau pembaca akhbar Harakah dan/atau pembaca-pembaca Artikel FItnah tersebut dan/atau pembaca-pembaca tersebut tahu dan/atau akan tahu yang ia merujuk kepada Plaintif-Plaintif.
>
> 30. ...
>
> 31. Penerbitan perkataan-perkataan dan/atau kenyataan-kenyataan yang tidak benar dan/atau berniat jahat dan/atau berunsur fitnah yang terkandung di dalam Artikel Fitnah yang diterbitkan di dalam akhbar Harakah telah menjejaskan reputasi dan nama baik Plaintif Pertama sebagai sebuah kerajaan yang mentadbir negeri Terengganu dan/atau Plaintif Ke-2 yang merupakan Menteri Besar Terengganu yang bertanggungjawab untuk membela nasib rakyat negeri Terengganu dan/atau sifat, kredit dan operasi Plaintif Pertama dan Plaintif Ke-2 telah dibawa ke skandal, keaiban dan penghinaan awam dan telah menanggung malu, derita dan kerugian.

[42] In the reply filed by the plaintiffs, there was no direct pleading adverting to any particulars of facts and matters as regards express 'malice' being the motive of the defendants in publishing the article in question. The

only averment there in so far as the issue of 'qualified privilege' raised by the defendants was concerned were found at paras. 8 and 15 of the reply reproduced below:

> 8. Plaintif-Plaintif menafikan dengan sekeras-kerasnya perenggan 17 Pembelaan Defendan-Defendan dan menegaskan bahawa kata-kata yang diadukan di dalam Artikel Fitnah tersebut tidak dalam apa jua keadaan sekalipun dilindung di bawah pembelaan perlindungan bersyarat memandangkan tidak terdapat sebarang salah laku dan/atau salah urus tadbir di dalam Program Bantuan Pakaian dan Alatan Sekolah tersebut.
>
> 15. Plaintif-Plaintif mempertikaikan perenggan 17(j) Pembelaan Defendan-Defendan dan mempersoalkan bahawa adakah akhbar Harakah mempunyai tanggungjawab sosial, agama dan undang-undang untuk menyiarkan kenyataan-kenyataan fitnah yang dibuat oleh Defendan Pertama yang mengaitkan Plaintif-Plaintif sebagaimana Artikel Fitnah tersebut?

[43] It is pertinent in this respect to note the commentary in *Gatley on 'Libel and Slander'* (11th edn.) (at p. 1037 para. 36.5) on this procedural requirement of providing particulars from which 'malice' was to be inferred by the court. It was stated there as follows:

> Malice. In particular, there is a specific rule of pleading that whenever it is intended to allege in answer to a plea of fair comment or qualified privilege that the defendant was actuated by express malice, the claimant must serve a reply giving particulars of the fact and matters from which the malice is to be inferred. **It is not sufficient merely to plead that the defendant acted maliciously**. The plea must be more consistent with the presence of malice than with its absence; if it is not, it is liable to be struck out.
>
> **Generalised or formulaic statements will not be permitted**. The court will be sceptical about pleas of malice in which the claimant pitches the meaning high and then asserts that the defendant did not or could believe that high meaning to be true, and so is malicious. *The claimant must allege specific facts from which it is alleged the inference is to be drawn. Where there are several defendants and the claimant relies on malice to defeat a defence of qualified privilege, he must, in order to succeed, aver and prove malice against each defendant*. It is not so clear that the same is true where the claimant seeks to rebut a plea of fair comment, but it would nevertheless be prudent in such a situation for the pleader to plead a case of malice against each defendant. Where the defendant is a corporation, the claimant should give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred.
>
> (emphasis added)

[44] There is obviously a wide divide between merely or casually stating in the pleadings that the statements were made 'maliciously' and meeting the requirement to provide the particulars of facts and matters from which express or actual malice is to be inferred to defeat the defence of qualified privilege or fair comment.

In *Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors* [2001] 7 CLJ 268, the court there most significantly noted as follows:

> I hold that such words "falsely and maliciously" as pleaded, do not make out a plea of express malice to negate the defence of qualified privilege. I gain support to this view from *Atkin's Court Form*s 2nd edn. vol. 25 wherein the learned editors explained the law in this way at p. 61: ... the law presumes the defamatory words are false unless the defendant pleads and proves justification. 'Maliciously' means with conscious intention .. and must be distinguished from malice (i.e. 'actual' or 'express' malice) which rebuts a defence of fair comment or qualified privilege ... .

[45] If one was to closely scrutinise the matters pleaded by the plaintiffs in the reply or even in the statement of claim in this case (as reproduced above), it was beyond any doubt that those averments there were bare and bland statements with respect to malice (niat jahat) on the part of the defendants with no particulars of the facts or detail of matters from which express malice could be inferred or attributed to the defendants. The plaintiffs had not condescended to providing any particulars as required by O. 78 r. 3(3) at all.

[46] As such there was nothing on the records for the learned trial judge to even launch into the further third enquiry as to whether the statements made on an occasion of qualified privilege (as found by Her Ladyship) had been motivated by actual or express malice, much less, to conclude that the plaintiffs had proven there was malice behind those statements made by the defendants. To re-emphasise, the conclusion of the trial court on this issue of 'malice' was therefore bereft of any valid basis. It was also evident from the grounds of the learned trial judge that there was no analysis or any deliberation at all as to any relevant fact or matters from which the court was to make or draw the inference of 'malice' as required, as against the defendants.

[47] In our evaluation this was where the trial judge had fallen into error. Her Ladyship had not directed her mind to or applied the correct principles of law (both procedural and substantive), when, in this case, the court went on to hold that express 'malice' had been established to negate the defence of qualified privilege which had been ruled in favour of the defendants. The appellate court, as we were, was entitled to interfere with the decision of the trial court where, as shown above in our discussion, the trial court had misdirected itself and applied wrong principles of law in coming to its conclusion. (See: *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773) It was also trite that the parties were also bound to their filed pleadings and in this case the plaintiffs' pleadings, may it be the reply or the statement of claim, both were sorely lacking of particulars of facts and matters from which an inference of express malice was to be deduced by the court. This was no doubt sufficient to allow the appeal before us.

[48] During the course of the further submission before us another question was also considered by us. This was as to whether in the light of developments in the law of defamation pertaining to defence open to newspapers or other media-related publications, based on what has come to be termed the 'Reynolds privilege', it was still necessary to consider or determine the issue of express 'malice' or whether it was relevant to still insist on the requirement that 'particulars as to facts and matters (from which the court was to make an inference of malice) had to be pleaded at all by the plaintiffs.

[49] This variation of the 'classical' defence of qualified privilege traced its development and recognition to the decision of the House of Lords in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 which derived its basis, as it would appear, from the duty owed by the press to the public at large to report and inform on matters of public concern or importance. *Gatley on Libel and Slander* (11th edn) at para. 14.2 has the following comment on this Reynolds privilege:

> The Reynolds category is not confined to publication through the 'media', though in practice that will be the context of almost all the cases. The very existence of the privilege in this type of case, however, is a matter which involves a closer scrutiny of the facts of the particular case. It involves questions like the extent to which the defendant took steps to verify the information he imparted, the urgency of the matter, the extent of the public's right to know' about it and whether the defendant has sought any explanation or comment from the person about whom the statement is made.

[50] Lord Nichols in this *Reynolds*' case had set out a non-exhaustive 10-point list of circumstances to be considered in respect of this privilege in 'media' cases. The underlying basis of the Reynolds type of privilege has been often described as 'responsible journalism'. This principle was applied in the later House of Lords decision in *Jameel Mohamed v. Wall Street Journal Europe SPRL* [2006] UKHL 44;[2007] 1 AC 359, although it was opined there that the question of 'responsible journalism' should be approached in a more practical manner. In *Bonnick v. Morris* [2003] 1 AC 300, Lord Nicholls in the Privy Council stated that the Reynolds privilege was to provide a proper degree of protection for responsible journalism when reporting matters of public concern; responsible journalism was the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals and for the benefit of this privilege journalists must exercise due professional skill and care.

[51] The controversy has however lingered on whether the Reynolds privilege was a new substantive defence or merely a specie of defence under the conventional defence of qualified privilege. In *Grant v. Torstar Corp* [2009] 3 SCR 640, the Supreme Court of Canada termed it a new defence of 'responsible communication' (Reynolds' factors for analysis) and went on to observe that it produced an uneasy fit with the traditional qualified privilege

defence. Lord Phillips MR (as he then was) in *Loutchansky v. Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] 1 All ER 652 commented that Reynolds privilege was "a different jurisprudential creature"; it is not the occasion which is protected but the material itself. Lord Hoffman and Baroness Hale in *Jameel (supra)* took the position that 'responsible journalism' could not be assimilated to traditional qualified privilege.

[52] The argument has been that 'responsible' or 'reasonable' journalism, whether as a new defence or otherwise, obviates any further enquiry into the issue whether the impugned statements were tainted with actual or express 'malice' when made. It is pertinent to note here that in the United Kingdom, by s. 4 of the recently introduced Defamation Act 2013, the so called Reynolds common law defence has been abolished and replaced by a new 'public interest' defence (the explanatory notes to the bill states that it was nevertheless to reflect the principles established in the *Reynolds* case and subsequent case law). This statutory defence requires the publisher to show that he or she 'reasonably believed that publishing the statements complained of was in the public interest' (a shift, as it would appear, from tests of responsible journalism to reasonableness of belief).

[53] The above discussion was to place in perspective the *Reynolds* privilege. The developments surrounding that area of law show that the 'Reynolds privilege' as a defence was always treated and recognised as a separate and distinct defence in contrast to the conventional common law defence of qualified privilege.

[54] In the instant case before us however, the *Reynolds* privilege was not raised as a separate or even as a specie of the defence of qualified privilege; what was pleaded was the defence of qualified privilege *per se*. Both parties conducted the trial on that basis. Save that in their submissions the plaintiffs had made reference to the decision in *Reynold*s' case to show that the writer or Harakah itself had a duty to verify the material published, both parties accepted that the principal defence of the defendants was the traditional common law defence of qualified privilege and the plaintiff had the obligation to establish express 'malice' to defeat that defence if found in favour of the plaintiffs. This was the position all along even in this appeal; see the supplementary submissions of both parties.

[55] It is also instructive to note that s. 12(1) of our Defamation Act 1957 states:

> Qualified privilege of newspapers
>
> 12.(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

The matters enumerated in part I of the schedule include fair and accurate report of proceedings of, international organisations and conferences, of public enquiries, and of legislatures and court proceedings outside Malaysia etc. If qualified privilege attached to such material can even be defeated by malice, what more with the matters that have been pleaded to be shielded under the usual defence of qualified privilege and so held by the court as in this case; that defence can only be defeated by express malice established against the defendants.

[56] It was also pertinent to point out that it was common knowledge that Harakah was a party organ of a political party which, no doubt, was available for purchase by the public at large. However what was also true was that it was not definitely in the nature of a daily newspaper with general public circulation in the likes of dailies like New Straits Times, The Star etc. There was therefore serious doubts or issues as to whether the Reynolds privilege or defence (where contestably no malice need be established to defeat the defence of qualified privilege) would be relevant at all. As highlighted above this was not how the case was premised or proceeded at the court below and these issues were not canvassed or explored at the trial.

[57] Accordingly, it was our considered view for the reasons elaborated above, that the plaintiffs could not in any case, avail of (nor could this court volunteer) the benefit of some of the observations, as it would appear, in this area of law following the Reynolds decision or in the subsequent cases which had considered the *Reynolds* privilege, which arguably was to the effect of obviating or dispensing with the need for the court to consider any issue pertaining to express malice, much less, any issue as to whether there was sufficiently pleaded or not, particulars of fact or matters from which an inference of 'malice' was to be made, as was required under our O. 78 r. 3(3).

[58] In conclusion therefore, as stated at para. 47 above of this grounds, this was a case where the learned trial judge had clearly misdirected herself and had failed to properly appreciate the relevant procedure or the law applicable in order to defeat or deny the qualified privilege that the court had found for the defendants in the first place. The conclusion of the trial judge that 'malice' had been proved was flawed and called for our interference.

We therefore are constrained to allow the appeal of the defendants with costs. The appellants/defendants are awarded a sum of RM15,000 as costs for this appeal and the deposit is to be refunded to the appellants/defendants.